

Shipbuilding

2019

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Van Steenderen MainportLawyers BV

Lexology Getting The Deal Through is delighted to publish the eighth edition of *Shipbuilding*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Turkey.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Arnold J van Steenderen of Van Steenderen MainportLawyers BV, for his continued assistance with this volume.

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PARTICIPATION AND OWNERSHIP

Restrictions on foreign participation and investment

- 1 Is the shipbuilding industry in your country open to foreign participation and investment? If it is open, please specify any restrictions on foreign participation.

The shipbuilding industry in Nigeria is open to foreign participation and investment. There are no restrictions on foreign participation and investment in the industry. Foreign investors are guaranteed unrestricted return of investment capital and proceeds in any convertible currency, provided such capital was imported into Nigeria under a Certificate of Capital Importation issued by a Nigerian bank. (See the Nigerian Investment Promotion Commission Act, Chapter N117, Laws of the Federation of Nigeria 2004 and Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Chapter F34, Laws of the Federation of Nigeria 2004.) A foreign company intending to do business in Nigeria is required to register a Nigerian subsidiary at the Corporate Affairs Commission (the Nigerian equivalent of Company House) with a minimum authorised share capital of 10 million naira. It is mandatory for a Nigerian subsidiary with foreign participation to apply for and obtain a one-off business permit in order to carry on business in Nigeria. It will also be subject to immigration requirements, including obtaining approved expatriate quota positions for the employment of foreigners in specialised job designations for which there are no skilled Nigerians. Expatriate quotas are renewable in two-year cycles. Furthermore, a foreign employee is required to obtain a combined expatriate residence permit and alien's card (CERPAC) to reside and work in Nigeria.

Government ownership of shipbuilding facilities

- 2 Does government retain ownership or control of any shipbuilding facilities and, if so, why? Are there any plans for the government divesting itself of that participation or control?

Prior to the enactment of the Public Enterprises (Privatisation and Commercialisation) Act, the government dominated all sectors of the Nigerian economy including shipbuilding. The participation of the government was through wholly state-owned public sector enterprises. Owing to the problems associated with the efficiency of those enterprises, the government resolved to transfer ownership of those public enterprises and assets to private investors. The government, however, still retains minority shareholding in certain privatised enterprises. One such enterprise is Nigerdock, the largest shipyard in Nigeria (25,000T capacity). The retention of ownership in public enterprises, including shipbuilding facilities, appears to be for the purpose of monitoring compliance with agreements reached during the privatisation exercise. The government had planned to fully divest its minority shareholding in these enterprises by way of initial public offers.

KEY CONTRACTUAL CONSIDERATIONS

Statutory formalities

- 3 Are there any statutory formalities in your jurisdiction that must be complied with in entering into a shipbuilding contract?

As with any other contract, a shipbuilding contract will be enforceable where the elements necessary for a valid contract can be established, that is: offer and acceptance, intention to create legal relations and consideration. Parties also enjoy the freedom to create obligations by contract and such obligations are enforceable provided the terms are not illegal or contrary to public policy. However, under the Merchant Shipping Act, Chapter M11, Laws of the Federation of Nigeria 2004 (the MSA), the builder of a ship is required to submit the plans and specifications of the ship for approval prior to the commencement of construction. Where a builder commences building or builds a ship without first obtaining the requisite approval as described above, the ship may be detained absolutely or until the builder carries out alterations as directed by the Minister for Transport. Failure to obtain the approval is an offence that is punishable upon conviction with a fine of not less than 100,000 naira.

Choice of law

- 4 May the parties to a shipbuilding contract select the law to apply to the contract, and is this choice of law upheld by the courts?

Under Nigerian law, the parties to a shipbuilding contract are at liberty to select the law of their choice to govern their contract. Generally, Nigerian courts uphold choice of law clauses in contracts on the basis of the common law principle of *pacta sunt servanda*, ie, parties are bound by their contract. It has, however, been held by the Supreme Court, per Oputa JSC, in *Sonnar (Nig) Ltd v Partenreedri MS Nordwind (Owners of the MV Nordwind)* [1987] 4 NWLR (Part 66) 520, that in order to be effective, the choice of law must be real, genuine, legal, reasonable and made in good faith. It should not be capricious and absurd. Thus, Nigerian courts do not consider choice of law clauses as conclusive in all cases. Where the choice of law is capricious and absurd (or has not been expressly selected by the parties in writing), the law with the closest connection to the transaction will be applied by Nigerian courts.

Nature of shipbuilding contracts

- 5 Is a shipbuilding contract regarded as a contract for the sale of goods, as a contract for the supply of workmanship and materials, or as a contract *sui generis*?

Shipbuilding contracts are regarded as contracts for the sale of goods, which are subject to the Sale of Goods Act 1893, a statute of general

application in Nigeria. A shipbuilding contract will be regarded as a contract for the sale of goods whether the vessel is in existence at the time of the contract or yet to be constructed. (See sections 1(1) and 5(1) of the Sale of Goods Act 1893 to the effect that contracts for sale comprise contracts for existing and future goods.)

Hull number

- 6 Is the hull number stated in the contract essential to the vessel's description or is it a mere label?

No Nigerian statute requires a shipbuilder to state a hull number in the description of a vessel in a shipbuilding contract. Therefore, the hull number stated in a shipbuilding contract is not essential to the vessel's description, particularly where the hull may be identified by other means. The hull number is, however, essential from a contractual perspective, as it assists a buyer to identify with certainty the specific hull being constructed by the shipbuilder in relation to the former's shipbuilding contract. The hull number is also important for the purpose of allocating materials and equipment in the shipyard or those supplied by the buyer to a specific hull. The hull number stated in the description of the vessel in the shipbuilding contract is placed on materials and equipment purchased or supplied for the hull to ensure traceability to that hull and safeguard against such materials and equipment being applied to a different hull in error.

Deviation from description

- 7 Do 'approximate' dimensions and description of the vessel allow the builder to deviate from the figure stated? If so, what latitude does the builder have?

The law requires the plans and specification of a newbuild to be submitted for approval prior to construction. Upon such approval, the shipbuilder will be restricted to the approved plans and specifications. Any deviation from the approved dimensions and descriptions contained in the plan and specifications will, therefore, require subsequent approval. Generally, where goods are sold by description and discovered upon delivery to have deviated materially from what was ordered, the buyer is entitled to repudiate the contract. However, where the agreed dimensions and description are 'approximate', it presupposes that the shipbuilder is at liberty to modify the specified figures, but such modification shall be within the contemplation of the parties. Essentially, therefore, the extent of any such deviation will be restricted to the reasonably permissible limits of the particular type of ship.

Guaranteed standards of performance

- 8 May parties incorporate guaranteed standards of performance whose breach entitles the buyer to liquidated damages or rescission? Are there any trade standards in your jurisdiction for coating, noise, vibration, etc?

Yes. Parties are at liberty to incorporate guaranteed standards of performance into their contract. Such agreed standards are enforceable. The remedy available to an innocent party will, however, depend on the nature and extent of the breach. Where there is a breach of a warranty, the innocent party will be entitled to damages, while a breach of a condition will entitle him or her to rescission.

Quality standards

- 9 Do statutory provisions or previous cases in your jurisdiction give greater definition to contractual quality standards?

Contractual quality standards agreed by parties are generally construed within the limits set by the agreed standard. However, being a contract

of sale governed by the Sale of Goods Act 1893, some terms relating to quality are implied in the contract. These terms relate to conformity with description, fitness for purpose and merchantable quality.

Classification society

- 10 Where the builder contracts with the classification society to ensure that construction of the vessel leads to the buyer's desired class notation, does the society owe a duty of care to the buyer, or can the buyer successfully sue the classification society, if certain defects in the vessel escape the attention of the class surveyors?

Generally, a classification society does not owe a buyer a contractual duty of care as the buyer is not privy to the contract between the builder and the classification society to ensure that construction of the vessel is in accordance with the buyer's desired class notation. As a general rule, a contract cannot confer rights or impose obligations on any person except the parties to it. This is based on the English common law principle of privity of contract. Therefore, the buyer's recourse for any defect in the vessel will lie against the builder of the vessel for breach of contract.

However, notwithstanding the absence of a contractual duty of care, the buyer may be able to sue the classification society in tort to recover damages for negligence. This is subject to the buyer successfully establishing the elements of negligence. The builder will have direct recourse against the classification society for breach of contract.

Flag-state authorities

- 11 Have the flag-state authorities of your jurisdiction outsourced compliance with flag-state legislation to the classification societies? If so, to what extent?

The flag-state authority has not outsourced compliance with flag-state legislation to any classification society. Flag-state duties are performed by the Nigeria Maritime Administration and Safety Agency (NIMASA). NIMASA was established by the NIMASA Act 2007. It has responsibility for performing all of the customary duties of a flag state.

Under the MSA, the approving authority may by means of regulations nominate any person within or outside Nigeria to be a classification society for the purpose of surveying and measuring ships and for other purposes subject to such conditions as the Minister of Transport may impose. This statutory provision has, however, not been implemented.

Registration in the name of the builder or the buyer

- 12 Does your jurisdiction allow for registration of the vessel under construction in the local ships register in the name of the builder or the buyer? If this possibility exists, what are the legal consequences of this registration?

Ships in Nigeria are registered at the Nigerian Ship Registration Office. The Register of Ships is maintained by the Registrar of Ships. Under the MSA, the Registrar of Ships is required to maintain such register or books as may be necessary, including a register for ships under construction. Ships under construction are registered in the name of the owner. An individual may be registered as sole owner of the ship in his or her own name, while a corporation may be registered as owner by its corporate name. On completion of the registration of the ship, the Registrar issues a certificate of registration.

However, notwithstanding the registration of a ship, any vessel intending to operate within the coastal and inland waters of Nigeria is required to obtain operational permits from the relevant government agencies.

Title to the vessel

- 13 May the parties contract that title will pass from the builder to the buyer during construction? Will title pass gradually, upon the progress of the vessel's construction, or at a certain stage? What is the earliest stage a buyer can obtain title to the vessel?

Pursuant to section 17(1) of the Sale of Goods Act 1893, title in specific and ascertained goods is transferred at such time as the parties to the contract intend it to be transferred. Therefore, the parties may contract that title will pass from the builder to the buyer during construction.

Depending on the agreement of parties as to when title should pass, title may pass gradually upon the progress of the vessel's construction or at any other stage.

In addition to the foregoing, the parties may state in the shipbuilding contract that the title in the ship passes to the buyer on a block-by-block basis, that is, that title passes as construction progresses rather than on completion or delivery. An agreement that title passes to the buyer on a block-by-block basis allows the financier, where necessary, to take possession of an incomplete structure that can be sold to mitigate loss if the need arises.

Passing of risk

- 14 Will risk pass to the buyer with title, or will the risk remain with the builder until delivery and acceptance?

Under section 20 of the Sale of Goods Act 1893, risk passes with title unless otherwise agreed by the parties. Therefore, parties are at liberty to state when risk will pass. Where title passes on a block-on-block basis, the risk passes as well and the buyer takes on all risks that may occur during construction.

Subcontracting

- 15 May a shipbuilder subcontract part or all of the contract and, if so, will this have a bearing on the builder's liability towards the buyer? Is there a custom to include a maker's list of major suppliers and subcontractors in the contract?

The ability of the shipbuilder to subcontract part or all of its obligations to a third party will depend on the terms of the shipbuilding contract, which may require the buyer's prior consent in writing, which consent shall not be unreasonably withheld.

Notwithstanding the builder's ability to subcontract to a third party, it does not discharge the liability of the builder towards the buyer. In some instances, the agreement may expressly contain provision to the effect that subcontracting is not a waiver of the rights of the buyer towards the builder with respect to the obligations of the builder under the shipbuilding contract. This liability may arise where a subcontracted portion of the construction does not meet the specification agreed under the shipbuilding contract.

Extraterritorial construction

- 16 Must the builder inform the buyer of any intention to have certain main items constructed in another country than that where the builder is located, or is it immaterial where and by whom certain performance of the contract is made?

The parties may agree that the builder informs the buyer of any intention to have any portion of the ship constructed in a country other than that where the builder is located. Otherwise, where the builder is permitted to subcontract part or all of the construction to a third party, the builder will not be under any obligation to inform the buyer of the location of any such subcontractor.

It is, however, important to mention that subject to any double taxation treaty between Nigeria and the other country, the profit on the subcontracted portion of the shipbuilding contract will be liable to tax in Nigeria.

PRICING, PAYMENT AND FINANCING

Fixed-price and labour-and-cost-plus contracts

- 17 Does the law in your country have different provisions for 'fixed-price' contracts and 'labour-and-cost-plus' contracts?

There is no distinction between fixed-price contracts and labour-and-cost-plus contracts in Nigerian statutes.

Price increases

- 18 Does the builder have any statutory remedies available to charge the buyer for price increases of labour and materials despite the contract having a fixed price?

There are no statutory remedies available to a builder to charge the buyer for price increases in labour and materials where parties have agreed a fixed price. Where the builder is desirous of charging the buyer for price increases of labour and materials in a fixed-price contract, a clause to that effect is usually inserted in the contract.

Retracting consent to a price increase

- 19 Can a buyer retract consent to an increase in price by arguing that consent was induced by economic duress?

In Nigeria, a contract will be vitiated where one of the parties successfully establishes that the contract or a portion of it was agreed under duress. The party alleging duress will be required to establish the duress by leading evidence in that regard. Therefore, a buyer may be able to retract consent to an increase in price where it can be proved that such consent was induced by economic duress. It has been held that a party who entered into a contract under duress may either affirm or avoid such a contract after the duress has ceased. Failure to avoid such a contract will render him or her bound by the contract as he or she will be deemed to have ratified the contract.

Exclusions of buyers' rights

- 20 May the builder and the buyer agree to exclude the buyer's right to set off, suspend payment or deduct certain amounts?

Yes, the parties may choose to exclude the buyer's right to set off, suspend payment or deduct certain amounts. This is premised on the parties' freedom to contract.

Refund guarantees

- 21 If the contract price is payable by the buyer in pre-delivery instalments, are there any rules in regard to the form and wording of refund guarantees? Is permission from any authority required for the builder to have the refund guarantees issued?

There are currently no rules guiding the form and wording of refund guarantees. However, a refund guarantee would generally be required to be in writing, by deed and signed by the guarantor. In addition, under the Banks and Other Financial Institutions Act 2010, where a shipbuilder seeks financial guarantee from a bank, the bank is required to obtain the permission of the Central Bank of Nigeria in order to issue the refund guarantee.

Advance payment and parent company guarantees

- 22 | What formalities govern the issuance of advance payment guarantees and parent company guarantees?

In Nigeria, advance payment guarantees are usually issued by insurance companies or banks. Under the Insurance Act 2003 and the National Insurance Commission Guidelines on Insurance Premium Collection and Remittance 2013, an insurance company will not issue an advance payment guarantee unless the premium in that regard has been paid. All other requirements prescribed by the insurance company must also be fulfilled.

In the case of an advance payment guarantee issued by a bank, the approval of the Central Bank of Nigeria is required prior to the issuance of the guarantee.

Regarding the issuance of parent company guarantees, a board resolution of the parent company approving the issuance of advance payment guarantee will be required.

In addition to the foregoing, the advance payment guarantee and parent company guarantee must be in writing, by deed and signed by the guarantor.

Financing of construction with a mortgage

- 23 | Can the builder or buyer create and register a mortgage over the vessel under construction to secure construction financing?

In Nigeria, there is a register for ships under construction. However, while a mortgage may be created over a ship registered in Nigeria or a share in such a ship, it does not appear that a mortgage can be created and registered over a ship under construction.

DEFAULT, LIABILITY AND REMEDIES

Liability for defective design (after delivery)

- 24 | Do courts consider defective design to fall within the scope of poor workmanship for which the shipbuilder is liable under the warranty clause of the contract?

Nigerian courts are yet to make any pronouncement on this. However, a Nigerian court will uphold the terms of a contract provided there are no vitiating elements. Therefore, in the absence of any vitiating elements, where parties have by their contract agreed that defective design shall fall within the scope of poor workmanship for which the shipbuilder is liable under the warranty clause of the contract, then, a Nigerian court will enforce the intention of the parties.

Furthermore, the courts may allow a party to add to or vary the contract by oral evidence upon proof that it is a custom or usage common to agreements of such nature. Therefore, a shipbuilder may be liable under the warranty clause where the buyer is able to establish that defective design falls within the scope of poor workmanship in a shipbuilding contract.

Remedies for defectiveness (after delivery)

- 25 | Are there any remedies available to third parties against the shipbuilder for defectiveness?

Generally, third parties are not entitled to any contractual remedy against a shipbuilder for defectiveness. This is because, as a general rule, a contract cannot confer rights or impose obligations on any person except the parties to that contract. Applying the 'proximate principle' established in the *locus classicus* – *Donoghue v Stevenson* (1932) AC 562 – the Supreme Court of Nigeria has held that manufacturers and intermediate parties in the chain of distribution are equally liable for

injury, death or damage caused to end users by defective products (see *Nigerian Bottling Co v Ngonadi* [1985] 1 NWLR (Pt. 4) 739). Therefore, a third party may recover damages for the tort of negligence, provided that the elements of the tort are proved. Nigerian courts have held that the absence of privity of contract between a plaintiff and defendant does not preclude liability in tort. Thus, manufacturers of products, including shipbuilders, may owe a duty of care to the end consumer or user. In addition to tort law, end users of defective products in Lagos State may have recourse against a manufacturer for damages under section 20 of the Law Reform (Torts) Law of Lagos State, Cap L82, Laws of Lagos State of Nigeria, 2015 (LRTL). The law stipulates that a manufacturer is liable for any damage caused wholly or partly by a defective product. Besides Lagos State, other federating states of Nigeria have promulgated laws similar to the LRTL regulating the manufacture and sale of defective products within their territorial jurisdiction.

Liquidated damages clauses

- 26 | If the contract contains a liquidated damages clause or a penalty provision for late delivery or not meeting guaranteed performance criteria, must the agreed level of compensation represent a genuine link with the damage suffered? Can courts mitigate liquidated damages or penalties agreed in the contract, and for what reasons?

Under Nigerian law, parties to a contract are at liberty to fix damages payable in the event of a breach. However, such agreed compensation must represent a genuine link with the damages suffered. Specifically, it has been held that where parties to a contract, as part of the agreement between them, fix the amount payable on the default of one of them or in the event of breach by way of damages, such sum is classified as liquidated damages where it is in the nature of a genuine pre-estimate of the damage that would arise from breach of the contract. Where the fixed amount is unrelated to the actual damage or loss suffered, it is considered a penalty and, therefore, unjustifiable. While penalty provisions are generally unenforceable under Nigerian law, a Nigerian court will not mitigate liquidated damages agreed in a contract.

Preclusion from claiming higher actual damages

- 27 | If the building contract contains a liquidated damages provision, for example, for late delivery, is the buyer then precluded from claiming proven higher damages?

The liquidated damages provision in the contract limits the liability of the party in breach. Therefore, a buyer will be precluded from claiming higher damages where parties have agreed on a certain sum as liquidated damages in relation to a particular breach. However, nothing precludes a party from claiming higher damages where such arise out of a breach separate from that in respect of which there has been an agreed sum. Also, a buyer may claim higher damages if it is expressly stated in the contract that the buyer may do so in circumstances where the actual damages exceed the quantum of liquidated damages agreed by the parties.

Force majeure

- 28 | Are the parties free to design the force majeure clause of the contract?

Under Nigerian law, parties to a contract are at liberty to design the terms of their contract, including terms concerning *force majeure*. Where a *force majeure* clause is included in the contract, it is common for the parties to specify the events constituting *force majeure* and the consequences of the occurrence of such events.

Umbrella insurance

- 29 | Is certain 'umbrella' insurance available in the market covering the builder and all subcontractors of a particular project for the builder's risks?

In Nigeria, umbrella insurance is available to shipbuilders and their subcontractors. This takes the form of an 'all-risks' insurance covering each and every aspect of the project.

Disagreement on modifications

- 30 | Will courts or arbitration tribunals in your jurisdiction be prepared to set terms if the parties are unable to reach agreement on alteration to key terms of the contract or a modification to the specification?

Nigerian courts have consistently held that it is not the duty of any court or tribunal to make contracts for the parties. The duty of the court is limited to the construction of contracts for the purposes of enforcement of the rights and obligations of the parties. The same can also be said of arbitration tribunals. The common practice is for parties to agree to refer any 'disputable' alteration to a clause in the contract to an agreed independent third party, usually an expert in the subject matter of the dispute. The decision of the expert in such situation is usually final and binding on the parties.

Therefore, courts in Nigeria and arbitration tribunals are unlikely to set terms of a contract even where the parties are unable to reach an agreement on alteration to key terms or modification to specifications.

Acceptance of the vessel

- 31 | Does the buyer's signature of a protocol of delivery and acceptance, stating that the buyer's acceptance of the vessel shall be final and binding so far as conformity of the vessel to the contract and specifications is concerned, preclude a subsequent claim for breach of performance warranties or for defects latent at the time of delivery?

Generally, in the absence of fraud or misrepresentation, parties are bound by the terms of their contract. Therefore, a buyer will be bound where he or she contracts that his or her acceptance of the vessel shall be final and binding to the extent that conformity of the vessel to the contract and specifications is concerned. However, because the purpose of the protocol is to confirm the time of the delivery of the vessel by the builder and the terms of acceptance by the buyer, the buyer may have a right of action for damages against the shipbuilder for latent defects. This is the case notwithstanding the fact that the protocol states that the buyer's acceptance of the vessel shall be final and binding. Essentially, where specific (latent) defects are detected after delivery, the buyer will have a right of action against the builder for breach of any implied term of the contract such as fitness for purpose.

Liens and encumbrances

- 32 | Can suppliers or subcontractors of the shipbuilder exercise a lien over the vessel or work or equipment ready to be incorporated in the vessel for any unpaid invoices? Is there an implied term or statutory provision that at the time of delivery the vessel shall be free from all liens, charges and encumbrances?

In view of the fact that the subcontract is between the shipbuilder and third-party suppliers or subcontractors, any right or claim arising from the subcontract will be against the shipbuilder. Consequently, while suppliers or subcontractors may exercise a lien over work or equipment to be incorporated in the vessel pending the settlement of any

outstanding invoices, they may not be able to exercise such lien over the vessel.

Under the MSA, a shipbuilder may exercise a lien or right of retention to secure claims for building or repairs of the ship. The lien or right of retention is, however, extinguished where the shipbuilder ceases to be in possession of the ship.

It is an implied term of section 12(3) of the Sale of Goods Act 1893 that at the time of delivery, the vessel shall be free from all liens, charges and encumbrances in favour of any third party not declared to or known to the buyer before or at the time when the contract was made.

Reservation of title in materials and equipment

- 33 | Does a reservation of title by a subcontractor or supplier of materials and equipment survive affixing to or incorporation in the vessel under construction?

A subcontractor or supplier may reserve title in the materials or equipment to be affixed or incorporated in the vessel under construction until payment is made by the shipbuilder for the materials or equipment. However, where the materials or equipment subject to a reservation of title clause are affixed to the vessel and the vessel is delivered to the buyer, the fact that the shipbuilder has not paid for the materials or equipment will not affect the title transferred to the buyer.

Third-party creditors' security

- 34 | Assuming title to the vessel under construction vests with the builder, can third-party creditors of the builder obtain a security attachment or enforcement lien over the vessel or equipment to be incorporated in the vessel to secure their claim against the builder?

Third-party creditors can obtain a security attachment over the vessel under construction or equipment to be incorporated in the vessel. This will, however, be subject to the builder's statutory right of retention.

Subcontractor's and manufacturer's warranties

- 35 | Can a subcontractor's or manufacturer's warranty be assigned to the buyer? Does legislation entitle the buyer to make a direct claim under the subcontractor's or manufacturer's warranty?

Generally, rights and obligations under a contract can be assigned or novated respectively to a third party except where this is not permitted by the express terms of the contract. The legal effect of such an assignment is that the buyer assumes all the rights relating to the assigned warranty.

There is no legislation that entitles a buyer to make a direct claim under the subcontractor's or manufacturer's warranty. Therefore, unless such warranty is assigned to the buyer, the buyer cannot make a direct claim under the subcontractor's or manufacturer's warranty.

Default of the builder

- 36 | Where a builder defaults in the performance of the contract, is there a legal requirement to put the builder in default by sending an official notice before the buyer's remedies begin to accrue? What remedies will be open to the buyer?

Generally, under Nigerian law, a party's default in the performance of its obligations under a valid contract constitutes a breach of contract. Parties, however, usually agree on the events that would constitute a breach of contract. The remedies are usually dependent on the nature and materiality of the breach. For example, where one party has committed a serious breach of contract, the innocent party has a right

to rescind the contract. It has been held that the contract is in such circumstances rescinded de futuro. One of the legal effects of rescission is that it discharges the innocent party of further obligations under the contract.

Apart from rescission, an innocent party may also make a claim for damages or specific performance or both. With respect to damages, the damages recoverable are the losses reasonably foreseeable by the parties and foreseen by them at the time of the contract as inevitably arising if one of them broke faith with the other. It has been held that in the contemplation of such a loss there can be no room for claims that are merely speculative or sentimental unless these are specially provided for by the terms of the contract on the occurrence of an event of default.

Specific performance is an equitable relief usually granted against a defendant or respondent to ensure the performance of its obligations under the contract. It is a discretionary remedy and would not be granted where a claimant would be adequately compensated by damages.

Remedies for protracted non-performance

- 37 | Are there any remedies available to the shipowner in the event of protracted failure to construct or continue construction by the shipbuilder apart from the contractual provisions?

See question 36.

Builder's insolvency

- 38 | Would a buyer's contractual right to terminate for the builder's insolvency be enforceable in your jurisdiction?

Nigerian courts will uphold the terms of a contract provided there are no vitiating elements. Consequently, where parties have by their contract agreed to terminate for insolvency, Nigerian courts will uphold such a clause.

Judicial proceedings or arbitration

- 39 | What institution will most commonly be agreed on by the parties to decide disputes?

Arbitration is the commonly agreed mechanism for the resolution of disputes arising from a shipbuilding contract. The London Maritime Arbitrators' Association appears to be the most frequently selected arbitral institution.

With regard to courts, however, by virtue of section 251(1)(g) of the Nigerian Constitution, matters pertaining to admiralty jurisdiction are within the exclusive jurisdiction of the Federal High Court. The admiralty jurisdiction of the Federal High Court includes maritime claims and section 2(3)(l) of the Admiralty Jurisdiction Act 2004 classifies claims in respect of shipbuilding contracts as a maritime claim. Therefore, disputes arising out of or in relation to a shipbuilding contract can only be entertained by the Federal High Court, except where the parties have agreed to refer the dispute to arbitration.

Buyer's right to complete construction

- 40 | Would a buyer's contractual right to take possession of the vessel under construction and continue construction survive the bankruptcy or moratorium of creditors of the builder?

In the event of insolvency or moratorium of creditors of the shipbuilder, the question whether the buyer can exercise a contractual right to take possession of the vessel under construction and continue construction will depend on whether title to the vessel under construction has passed to the buyer. Where title to the vessel under construction has

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passed to the buyer, the buyer will be entitled to exercise proprietary rights of ownership (such as taking possession) to the exclusion of the receiver or liquidator. However, that will not be the case where title to the vessel under construction resides with the shipbuilder. In such circumstances, the right of the receiver or liquidator to possession of the vessel under construction will defeat the interest of the buyer.

ADR/mediation

- 41 | In your jurisdiction, do parties tend to incorporate an ADR clause in shipbuilding contracts?

Parties have the freedom to agree on the mechanism by which disputes are to be resolved. This includes ADR. There is, however, a preference for arbitration over other forms of ADR.

Default of the buyer

- 42 | Where the buyer defaults in the performance of the contract, what remedies will be available to the builder? What are the consequences of the builder's cancellation of the contract?

Where a buyer defaults in the performance of the shipbuilding contract, the builder may have recourse to those remedies specified in the contract. However, the ship is the builder's ultimate security. Therefore, where, for instance, the buyer refuses to pay, the builder can enforce its rights as an unpaid seller as provided in the Sale of Goods Act 1893.

Generally, the consequence of cancellation of a contract is that parties are discharged from performing future obligations under the contract. However, the parties will still be liable for any breach of the contract that occurred prior to cancellation.

CONTRACT FORMS AND ASSIGNMENT

Standard contract forms

- 43 | Are any standard forms predominantly used in your jurisdiction as a starting point for drafting a shipbuilding contract?

No particular standard forms are predominantly used in drafting shipbuilding contracts in Nigeria. However, Norwegian forms and the Shipbuilders' Association of Japan form have been preferred in shipbuilding contracts concluded in Nigeria.

Assignment of the contract

44 | What are the statutory requirements for assigning the contract to a third party?

In Nigeria, there are no statutory requirements for the assignment of shipbuilding contracts. However, general rules of common law of contract will apply.

The effect of an express clause prohibiting assignment in the contract is that neither party can assign its rights or benefits under the contract. Any assignment under the contract will be ineffective. It is, however, common for parties to specifically limit or prohibit either or both parties from assigning their rights under the contract. A typical example of such limitations is the requirement for consent from one or other of the parties to the contract, such consent not to be unreasonably withheld.

Generally, the form of an assignment will depend on the prior agreement of the parties. A mere notice will, however, suffice where the subject of the assignment is the rights or benefits of a party under the contract. Where the assignment relates to the liability or burden under the contract, a novation agreement will be required.

Where the subject matter of the assignment is the rights or benefits under contract, the original contract will survive such an assignment. However, where the assignment relates to the liability and obligations under the contract (usually pursuant to a novation agreement), the original contract is discharged and the new party will assume the liability and obligations originally agreed by the relevant party novating its obligations under the contract.

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